

KHONG SENG v. NG TEONG KIAT BISCUIT FACTORY LTD.

[O.C.J. (Gill J.) October 26, 1963]

[K.L. — Civil Suit No. 265 of 1962]

Sale of Goods (Malay States) Ordinance, 1957, s.16(1)(a)—Sale of tallow—Tallow supplied of inferior quality—Notice by buyer—Seller knowing purpose for which tallow required by buyer—Reliance on skill and judgment—Implied condition or warranty—Repudiation—Damages.

The plaintiffs claim \$2,956.50 being the cost of 219 tins of tallow supplied to the defendant company at \$13.50 per tin at their request on February 14, 1961. The defendants deny the claim stating that firstly they only ordered 100 tins of tallow and secondly that the tallow supplied was of inferior quality and not fit for the purposes for which it was supplied, although the plaintiff had by a verbal agreement on February 10, 1961 expressly warranted that the tallow would be of a quality fit for the manufacture of biscuits and free from faults and defects. The defendants used 15 of the tins supplied to manufacture 242 tins of biscuits and found the biscuits wholly unsaleable. The plaintiff was informed of the unsuitability of the tallow and asked to remove the balance of 85 tins together with the 119 tins supplied in excess which the plaintiff failed or neglected to do. The defendants further counterclaim damages for loss of 242 tins of biscuits at \$2.20 per tin less the value of 15 tins used in the manufacture of biscuits — leaving a balance of \$329.90.

Held: (1) there was an implied condition (within the meaning of section 16(1)(a) of the Sale of Goods Ordinance) in the contract between the parties that the tallow supplied would be reasonably fit for the manufacture of biscuits;

(2) there was a breach of condition and there was no bar to the defendants repudiating the contract.

Cases referred to:—

- (1) *Chaproniere v. Mason* [1905] 21 T.L.R. 636.
- (2) *Wallis v. Russell* [1902] 2 Ir. Rep. 585.
- (3) *Frost v. The Aylesbury Dairy Company Limited*. [1905] 1 K.B. 608.
- (4) *Gillespie Brothers & Co. v. Cheney Edgar & Co.* (1896) 2 Q.B. 59.
- (5) *Manchester Liners, Ltd. v. Rea Ltd.* [1922] 2 A.C. 74, 79.
- (6) *Turnar v. Mucklow* (1862) 6 L.T. (N.S.) 690.

CIVIL SUIT.

V. K. Palasuntharam for the plaintiff.

M. S. Naidu for the defendants.

Cur. Adv. Vult.

Gill J.: The plaintiff's claim in this case is for \$2,956.50 being the cost of 219 tins of tallow supplied to the defendant company at \$13.50 per tin at their request on the 14th day of February, 1961. The defendants deny the claim, their defence being, firstly, that they ordered only 100 tins of tallow so that there was a delivery of 119 tins in excess of the order, and secondly, that the tallow supplied was of inferior

quality and not fit for the purpose for which it was supplied.

As regards the second part of their defence, the defendants allege that by a verbal agreement on the 10th day of February, 1961 the plaintiff expressly warranted that the tallow would be of quality fit for the manufacture of biscuits and free from faults and defects. They used 15 tins of tallow to manufacture 242 tins of biscuits and found that the biscuits were wholly unsaleable. The plaintiff was informed of the unsuitability of the tallow and asked to remove the balance of 85 tins together with the 119 tins of tallow supplied in excess, which he failed and neglected to do. By way of counterclaim the defendants claim damages for the loss of 242 tins of biscuits at \$2.20 per tin, from which, they agree, should be deducted the value of 15 tins used in the manufacture of biscuits, thus leaving a balance of \$329.90 in their favour.

The parties are in dispute as to the actual date of the contract under which the tallow was supplied. The plaintiff says that Ong Chee Keong, the Manager of the defendant firm, came to the Central Market, Kuala Lumpur on 13th February, 1961 and asked him to supply whatever quantity of tallow he had. Ong Chee Keong, on the other hand, says that he placed the order by telephone on 10th February, 1961 at 10 a.m. and conveyed it to the plaintiff's brother named Khong Hong who answered the telephone. There was no reply to his order from the plaintiff or his brother on that day, but the plaintiff spoke to him on the telephone on 11th February, 1961 at about 11 a.m. and said that he had some stock of tallow to supply. He then told the plaintiff to supply 100 tins and the price was agreed at \$13.50 per tin. Gan See Tong, the storekeeper of the defendant firm, who took delivery of the tallow on 14th February, 1961, has given evidence to say that Ong Chee Keong told him on 11th February, 1961 that he had bought 100 tins of tallow from Khong Seng, the plaintiff, who was known to him because his factory had bought tallow from him previously and he had come to the factory with the goods.

It is abundantly clear from the evidence that the defendants had bought from the plaintiff previously. I have therefore formed the opinion that the order for tallow was placed by telephone. It is to be observed that the first step in the negotiations was an inquiry from the plaintiff as to whether he had any tallow to sell. It is therefore more probable that this inquiry was made by telephone. I cannot believe that Ong Chee Keong, having had previous dealings with the plaintiff, would go to the trouble of making a journey to the Central Market merely to make

this inquiry when he could do so by telephone. I therefore reject the plaintiff's story that Ong Chee Keong saw him in the Central Market on 13th February, 1961. In the circumstances I find as a fact that the order was placed by telephone on 10th February, 1961 and that it was accepted on the 11th February, 1961 which is the date of the contract.

As regards the quantity to be supplied under the contract, the plaintiff's case is that Ong Chee Keong said that he was prepared to take any amount which the plaintiff could supply. He said that he would check up his store and let Ong Chee Keong know what quantity he could supply. Having checked and found that he had 219 tins, he informed Ong Chee Keong accordingly by telephone at about 3 p.m. on 13th February, 1961, the date of the alleged visit by Ong Chee Keong to the Central Market. He went on to say that the price was agreed at \$13.50 per tin and it was agreed that 219 tins of tallow should be supplied on the following day. He delivered 219 tins of tallow at the defendants' factory on the following day. Ong Chee Keong was present at the factory at the time of delivery but he left whilst delivery was still being made. About 30 tins of tallow were examined at the time of delivery and when delivery was completed he was given a document by the storekeeper. No objection was taken to his delivering more than 100 tins and he was not asked to take back 119 tins.

Ong Chee Keong's story is that when he telephoned on 10th February, 1961, he informed the plaintiff's brother that initially he required 100 tins of tallow and that if they were found suitable for the manufacture of biscuits he would obtain tallow from the plaintiff again. The plaintiff spoke to him on the telephone on 11th February, 1961 at about 11 a.m. when he said that he had some stock of tallow to supply. He told the plaintiff to supply 100 tins and the price was agreed at \$13.50 a tin. The plaintiff said delivery would be effected on the following day but it was not made until 14th February, 1961 when the factory was closed for the Chinese New Year. He was not present at the time of delivery and came to know about it on 18th February, 1961. On the same day he telephoned to the Central Market and asked the plaintiff to remove 119 tins. He denied that he saw the plaintiff in the factory on 18th February, 1961.

The evidence of the storekeeper, Gan See Tong, is that he took delivery of the tallow on 14th February, 1961. The factory was closed on that day for the Chinese New Year, and he was in his house when someone sent for him saying that the plaintiff had brought tallow. He went to the store and saw the plaintiff there.

A He told the plaintiff that it was a holiday and there were no workmen to unload the tallow. The plaintiff said that his workmen would do the unloading. The storekeeper went on to testify that when he found that the plaintiff had brought 219 tins of tallow he said that his instructions from the manager were to receive only 100 tins and refused to take delivery of any more. The plaintiff thereupon pleaded with him and asked him to allow the remaining 119 tins to be left in the store so that he could save transport expenses and settle the matter with the manager later. The plaintiff then asked him to issue a receipt. He fetched two sheets of paper on which the plaintiff wrote out a receipt which he signed. The plaintiff took away one of the receipts and left the other with him. He handed the duplicate receipt to the office clerk for recording purposes on 18th February, 1961. The plaintiff came to see him on 18th February, 1961 at about 11 a.m. and took away the duplicate receipt from him saying that he wanted to see the manager. Not finding the manager in the office the plaintiff left. The witness informed the manager about the receipt of 219 tins at about 2 p.m. on the same day whereupon the manager scolded him for receiving 219 tins when his instructions were to receive only 100 tins. He did not see the plaintiff after 18th February, 1961, and there are still 204 tins of tallow lying in the store, 15 tins having been taken away for the manufacture of biscuits on 20th February, 1961. This witness was asked under cross-examination about the endorsement by means of a rubber chop on the back of the duplicate receipt (P.3). He replied that the blanks on the rubber chop were filled in by the clerk whose handwriting he recognised. A point was made as to why he had entered the amounts for all the tins on both the original and the duplicate receipts, but his answer was that these amounts were entered by the plaintiff himself.

H Having carefully considered the whole of the evidence as to the quantity of tallow ordered, I am satisfied on the balance of probabilities and find as a fact that the order was for 100 tins only, although the manager of the factory did say that he would order more if the tallow supplied was found to be suitable. I also find as a fact that the plaintiff did not meet the manager when he went to the factory on 18th February, 1961 and collected the duplicate receipt (P.3) from the storekeeper.

I With regard to quality, the evidence of Ong Chee Keong is that he made known to the plaintiff that the tallow was required for the manufacture of biscuits and that the plaintiff understood it to be so. The plaintiff also knew that if the tallow was not suitable he should replace it with good tallow and he agreed to it. In fact

the plaintiff was no stranger to him as he had been dealing with him and his brother since 1957. The plaintiff himself admitted under cross-examination that he knew that the defendants were manufacturing biscuits. He knew that the defendants wanted tallow for the manufacture of biscuits because Ong Chee Keong told him so. He had supplied tallow to the defendant four or five times previously. However, he went on to say that Ong Chee Keong did not say that the tallow supplied must be suitable for the manufacture of biscuits and that if the tallow was not good he would return it. The plaintiff went on further to say that Ong Chee Keong told him that the tallow was required for the manufacture of biscuits for the military and that therefore the quality need not be so good. He asked the manager for payment on 18th February but he was asked to come on 21st February. On 21st February he was asked to come on 23rd February. On this occasion Ong Chee Keong said that the tallow supplied was bad. This was the first time any complaint was made about quality.

The plaintiff's contention seems to be that as far as he was concerned the defendants wanted tallow, and he supplied tallow. He was not asked to supply tallow of any particular standard or quality. He had only one quality of tallow which was made from the fat taken from the meat which he sold at the Market, and none of the tallow supplied by him on previous occasions was ever returned to him. However, it is quite clear from the evidence that the purpose for which the tallow was required was made known to the plaintiff, and indeed he has admitted that it was known to him.

Ong Chee Keong says that he manufactured biscuits with plaintiff's tallow on 20th February, 1961 and found the results to be bad. He went to see the plaintiff at the Central Market on the morning of 21st February, 1961 and told him that he had used 15 tins of tallow and found it to be unsuitable. He also told the plaintiff that he was prepared to make payment for the 15 tins of tallow used but that he would have to replace the tallow supplied with good tallow if he wanted payment for the remaining 204 tins. As the plaintiff did not come to the factory he went to see him again at the Central Market on 23rd February, 1961 and told him to remove the 204 tins and replace them with good tallow. He told the plaintiff again that he had manufactured 242 tins of biscuits with the tallow supplied and that the biscuits were spoilt for which he was going to claim damages. After 23rd February, 1961 he did not see the plaintiff again but received a letter dated 25th February, 1961 from plaintiff's solicitors asking for payment. He replied by his solicitor's letter dated 6th March,

A 1961 in which he asked the plaintiff to take away his tallow and to pay damages for the spoilt biscuits. The plaintiff apparently did nothing until November 1961 when he sent another letter, to which the defendants replied repeating their claim for damages and denying liability for the tallow supplied except for the 15 tins of tallow actually used.

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Ong Chee Keong was cross-examined at length on the question of quality. He said that he could not say whether the tallow supplied was suitable except by looking at the results and that he felt that he could trust the plaintiff's skill and judgment as to the right type of tallow for the manufacture of biscuits. He admitted frankly that from experience he had found that if the tallow was too hard the biscuits would not become crisp. He noticed that the tallow supplied by plaintiff was hard, but that was when it was mixed with the flour and not when it was in the tins. He had bought tallow from the Singapore Cold Storage at approximately \$1.50 less per tin than the price which he agreed to pay to the plaintiff but on this occasion he placed the order with the plaintiff because the Cold Storage was not in a position to supply in bulk. He also admitted that after he had found the plaintiff's tallow unsatisfactory he was able to get from the Cold Storage in smaller quantities from time to time all the tallow he wanted until he received his next shipment from overseas on 16th May, 1961. He denied that his rejection of the plaintiff's tallow was for any reason other than that it was unsuitable for the purpose for which it was required. He repudiated the suggestion made by the plaintiff's counsel that he decided not to accept the plaintiff's tallow because he was able to get tallow at a cheaper price from the Singapore Cold Storage. I accept the evidence of Ong Chee Keong that he asked the plaintiff to take away the excess quantity of tallow supplied and that he informed the plaintiff about the tallow being unsuitable. I do not for one moment accept the plaintiff's story that the manager told him that the tallow was required for manufacturing biscuits for the military so that the quality need not be so good.

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I now come to consider the rights and obligations of the parties on my findings on the facts which I have stated above. The general rule of a contract of sale is *caveat emptor*, so that where a person buys without proper description or without stipulating the purpose for which he requires the goods or without sample, he has no one to blame but himself if he does not get what he wants. Ordinarily, therefore, there is no implied condition or warranty of the quality of goods sold or of their fitness for any particular purpose. But the Sale of Goods (Malay States) Ordinance, 1957 contains important qualifications

of this principle. The qualification of this principle, or rather the exception to the general rule which I have stated above, which is applicable in this case and which has indeed been raised by the defendants, is contained in section 16(1) (a) of the Ordinance which reads as follows:—

“(a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the cause of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.”

The proviso to the exception need not be considered because, quite clearly, it does not apply in this case.

Section 16 of our Ordinance is based on section 14 of the English Sale of Goods Act, 1893, about which it has been said that it contains what is left of the rule of *caveat emptor* after the exceptions have made large inroads upon it. *Anson on Contract* (21st edition) at page 122 mentions the cases of *Chaproniere v. Mason* ⁽¹⁾ and *Wallis v. Russell* ⁽²⁾ to illustrate the meaning of section 14(1) of the English Act. In the former case the plaintiff bought a bath bun at a baker and confectioner's shop belonging to the defendant. When he bit the bun one of his teeth struck a stone and was broken by it. *Anson* says of this case:—

“It is clear that one who buys a bath bun from a baker makes known to him by implication that he requires it for the purpose of eating; that in such a case the buyer relies on the baker's skill or judgment; and that bath buns are goods which it is in the course of a baker's business to supply. In this case, therefore, there was an implied condition that the bun should be reasonably fit for eating, and the Court of Appeal thought that the presence of a stone in the bun was evidence that it was not so.”

In the latter case a little girl bought from a fishmonger “two nice fresh crabs for tea”. The crabs were not fresh; indeed, they were highly poisonous. The fishmonger was held liable in damages for breach of this implied condition.

The rule in relation to implied conditions and warranties applies equally in the case of latent undiscoverable defects. In *Frost v. The Aylesbury Dairy Company, Limited* ⁽³⁾ the defendants, who were milk dealers, supplied the plaintiff with milk which was consumed by himself and his family. A book in which the daily supply was entered was interleaved with a printed notice of the precautions taken by the defendants to supply milk, pure and unadulterated and free from the germs of disease. The

A milk supplied contained germs of typhoid fever, and the plaintiff's wife was infected thereby and died. The existence of the germs could only be discovered by prolonged investigation. In an action, upon an implied warranty under section 14(1), of the Sale of Goods Act, 1893, to recover the expenses to which the plaintiff had been put by the illness and death of his wife, it was held that the purpose for which the milk was supplied was sufficiently made known to the sellers by its description, that there was evidence that the buyers relied on the seller's skill, and that there was an implied condition under the Act that the milk was reasonably fit for consumption, although the defect was not discoverable at the time of the sale.

It is clear from section 16(1) (a) of our Ordinance that the defendants must satisfy the court (a) that they made known to the plaintiff the particular purpose for which the tallow was required, (b) that they relied on the plaintiff's skill and judgment as to the suitability of the tallow for that purpose and (c) that it was in the course of the plaintiff's business to supply tallow. In *Gillespie Brothers & Co. v. Cheneye Edgar & Co.* ⁽⁴⁾ Lord Russell C.J. indicated that the mere disclosure of a purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller. The position was made quite clear in the House of Lords in the following words of Lord Buckmaster in *Manchester Liners, Ltd. v. Rea, Ltd.* ⁽⁵⁾

“If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment.”

As the purpose for which the tallow was required in this case was made clear to the plaintiff, it follows that the purchasers relied on his skill and judgment.

The next point I have to consider is whether the plaintiff sold tallow in the ordinary course of his business. It has been contended on his behalf that he was a beef seller at the Central Market, Kuala Lumpur and that he did not sell tallow in the ordinary course of his business. His learned counsel has referred me to the case of *Turner v. Mucklow* ⁽⁶⁾ where the buyer, who had ordered “spent madder”, which was merely the refuse product of the seller's manufacture, and was sold as such, intending out of it to produce garancine, which it failed to produce, was held bound to take the risk of the goods not producing the desired result. With great respect to the learned counsel I do not agree that tallow is a refuse product of beef. What was sold in this case has been described by the parties as tallow but in reality it was melted beef fat which

is no more a refuse product of beef than lard is of pork or for that matter butter of milk. The plaintiff himself has stated that he extracted the fat from the beef and turned it into tallow which he sold separately. He has admitted that he had supplied such fat to the defendants on previous occasions. In the present case a very large order for tallow was placed with him by the defendants and he met that order. In point of fact he supplied more tallow than was ordered. In those circumstances I do not see how it can be argued that he did not sell tallow in the ordinary course of his business.

In view of what I have stated above, I have come to the conclusion that there was an implied condition in the contract between the parties that the tallow supplied would be reasonably fit for the manufacture of biscuits. It has been argued on behalf of the plaintiff that the stipulation as to the suitability of tallow was a warranty and not a condition. A warranty is defined in section 12(3) of the Ordinance as a stipulation collateral to the main purpose of the contract. The stipulation in this case quite clearly was not collateral to the main purpose of the contract but a stipulation essential to the main purpose of the contract as defined in section 12(2) of the Ordinance. The main purpose of the contract clearly was the supply of tallow which was reasonably fit for the manufacture of biscuits. The fact that the defendants have used the word "warranty" in their pleadings does not alter the fact that the stipulation was in fact a condition, and this is clearly laid down in section 12 of the Ordinance itself wherein it is stated that the stipulation may be a condition though called a warranty in the contract.

Benjamin on Sale (8th edition) at page 986 says that where the buyer has agreed to buy goods which are not then in existence, or are unascertained, on the seller's contracting that they are of a specified quality or fitness, nothing seems clearer than that this warranty is as a rule not an independent contract, but is a part of the original contract, operating as a condition, and what the buyer intends when accepting the offer is: "I agree to buy if the goods are equal to the quality you warrant". He then goes on to quote the following passage from the learned author of *Smith's Leading Cases* (11th edition) Vol. 2, page 28, expressing the rules deduced from the authorities:—

"A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities; but the property passing by the contract of sale, a breach of the warranty cannot entitle the vendee to rescind the contract and re-vest the property in the vendor without his consent. . . . But where the subject-matter of the sale

A is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because *the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity*; and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

B Applying the above principles to the present case, I have reached the conclusion that there was a breach of condition, so that the defendants have a right to repudiate the contract. They had to use a part of the tallow for the manufacture of biscuits before they could say whether it was fit for the purpose or not. It may be argued that they should not have gone on using the tallow when the result by using the first four tins of tallow was found to be unsatisfactory. However, the fact that they manufactured two further quantities of biscuits using larger quantities of tallow would seem to indicate that they were more concerned with retaining the tallow rather than rejecting it. It was only after the results of the second and third manufactures proved to be unsatisfactory that they decided not to accept the rest of the tallow and to repudiate the contract. The defect in the tallow was a latent and undiscoverable defect which they could discover only by putting the tallow to use.

I have carefully considered the provisions of sections 13 and 59 of the Ordinance and I do not think that in the light of the evidence in this case there is any bar to the defendants repudiating the contract. However, they have to pay for the 15 tins of tallow used and claimed damages which they have suffered by using that quantity of tallow in order to ascertain its suitability. I will allow damages at \$1.80 per tin which was the actual cost of production. The plaintiff's claim is therefore dismissed and there will be judgment for the defendants on the counterclaim for \$233.30. I also make an order that the plaintiff do remove the 203 tins of tallow lying in the defendants' store within 14 days. The tin put in as an exhibit in this case is also to be returned to him, subject to any other order in the event of an appeal. The plaintiff must pay the defendants' costs on the claim, but on the counterclaim I make no order as to costs in view of the very small amount recovered.

Claim dismissed.

Solicitors:—R. P. S. Rajasooria; Braddell & Ramani.